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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Calaveras)**

THE PEOPLE,

Plaintiff and Respondent,

v.

WAYNE ERIC TOWNSEND,

Defendant and Appellant.

C063008
(Super. Ct. No. CV35770)

and

C063946
(Super. Ct. No. F4541)

In these consolidated appeals, defendant Wayne Eric Townsend contends he is entitled to *conduct* credit for 36 days he spent at Deuel Vocational Institute (DVI), after he had been committed to the California Rehabilitation Center (CRC) as a narcotics addict. Defendant concedes he would not earn *conduct* credit for time spent at CRC. But because he demanded a jury trial to contest his CRC commitment, he never arrived at CRC, he was merely housed at DVI--a reception center for incoming inmates--like any other state prisoner. Therefore, he contends he is entitled to *conduct* credit for that period. We agree.

PROCEDURAL BACKGROUND

On April 20, 2009, in Calaveras County Superior Court case No. F4541, defendant pleaded guilty to possession of cocaine, a felony, and giving a false name to a peace officer, a misdemeanor, in exchange for the dismissal of other counts. (Health & Saf. Code, § 11350, subd. (a); Pen. Code, § 148.9, subd. (a).) The factual basis for the plea shows that on March 11, 2009, a peace officer searched defendant after he gave a false name, and found he had 2.8 grams of cocaine.

On June 1, 2009, the trial court considered appointing a doctor to evaluate defendant for narcotics addiction, and directed the prosecutor "to file a CRC petition."

Accordingly, on June 2, 2009, the prosecutor filed a CRC civil commitment petition, Calaveras County Superior Court case No. CV35770.

On July 20, 2009, the trial court denied probation based on defendant's record, and proposed to impose the upper term of three years in state prison on the felony, a concurrent term of six months on the misdemeanor, suspend the sentence, and send defendant to CRC. Defendant said he would be excluded from CRC and did not want to go to CRC. The trial court then imposed but suspended execution of the prison term and appointed Dr. Gary Cavanaugh to evaluate defendant for narcotics addiction.

Dr. Cavanaugh's August 3, 2009 report found defendant met the criteria for narcotics addiction treatment.

On August 21, 2009, over defendant's objection, the trial court committed defendant to CRC.

The formal order committing defendant as a narcotics addict was filed on August 24, 2009.

Defendant arrived at DVI on August 26, 2009.

On August 29, 2009, defendant signed a pro. per. demand for a jury trial, and on August 30, 2009, he signed a pro. per. notice of appeal in the civil case (No. CV35770), which we docketed as appellate case No. C063008. Both documents were filed by the trial court on September 1, 2009.

On September 15, 2009, defendant's counsel filed a notice of appeal in the criminal case (No. F4541), which we docketed as appellate case No. C063104.

On September 23, 2009, the trial court scheduled a trial setting conference based on defendant's demand for a jury trial. After a transportation delay, defendant was returned to Calaveras County on October 1, 2009.

On October 5, 2009, the parties agreed defendant did not want to go to CRC, and the trial court stated defendant would receive the previously imposed prison sentence. The trial court then recalled the CRC commitment. This obviated defendant's demand for a jury trial on the issue of his narcotics addiction, which he withdrew.

On October 8, 2009, defendant abandoned his then-pending appeal (C063104) in the criminal case, No. F4541.

On November 9, 2009, the trial court lifted the suspension of the previously imposed prison sentence.

Defendant's presentence credits were addressed at a hearing held on December 21, 2009. The probation officer had recommended denial of conduct credits for the time defendant spent at DVI under the CRC commitment, a period of 36 days. Thus, probation's recommendation was a total of 348 days of credit. The trial court awarded the credits as recommended. Defendant timely appealed in the criminal case (No. F4541), and we docketed the appeal as No. C063946.

On April 8, 2010, we granted defendant's request to consolidate the still-pending civil appeal, No. C063008, with his second criminal appeal, No. C063946.

We appointed counsel for defendant on appeal, and counsel promptly filed a motion in the trial court for correction of defendant's custody credits. (Pen. Code, § 1237.1; see *People v. Hodges* (2009) 174 Cal.App.4th 1096, 1102, fn. 5.) On April 16, 2010, the trial court modified the judgment to grant defendant additional presentence credit, pursuant to the more generous conduct credit formula recently enacted. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) The trial court again gave defendant *actual* credits for the 36 days spent at DVI, but denied his request for *conduct* credits for those 36 days. Defendant received 244 days of actual presentence credit, and 208 days of presentence conduct credit.

DISCUSSION

The parties agree that a person is not entitled to *conduct* credits for time spent at CRC. However, this rule begins our inquiry, it does not end it.

"Commitment to CRC is a *civil* proceeding, not a criminal action, and such treatment facilities are essentially nonpenal in character. . . .

"Thus, CRC committees are in effect a privileged minority who are subject to less 'penally restrictive settings' than most prison inmates. [Citation.] Furthermore, CRC committees can avail themselves of treatment programs which are not available to most prison inmates. For these reasons, we conclude that CRC committees are not similarly situated to prison inmates for the purpose of receiving conduct credit." (*People v. Eddy* (1995) 32 Cal.App.4th 1098, 1110.)

"It is settled that a defendant is not entitled to worktime or conduct credits for time served at CRC. [Citations.] A defendant is, however, entitled to Penal Code section 4019 conduct credits from the time of his or her exclusion from CRC for time spent either at CRC or in county jail. [Citation.] It also has been held that at least in some instances a defendant who has been excluded from CRC is entitled to worktime credits notwithstanding that after exclusion the defendant continues to be held at the CRC institution. In *People v. Rodriguez* (1997) 52 Cal.App.4th 560, the Fifth Division of this court [First Appellate District] held that equal protection guarantees

required that the defendant there, a person excluded from CRC because of a medical condition, be given worktime credits for time spent at a CRC facility after exclusion. The court noted that authority exists for awarding worktime credits to prison inmates who are unable to participate in a work program through no fault of their own. [Citations.] The court found, '[o]nce a formal determination was made that Rodriguez was "not suitable" for CRC, she faced all too familiar administrative delays in arranging transport to the sentencing court and in scheduling a sentencing hearing before the proper sentencing judge. The length of Rodriguez's term of imprisonment should not be adversely affected by the vagaries of inter-county prisoner bus scheduling or changing judicial assignments. She should therefore be awarded custody credits from the time CRC formally notified the court of its determination that she was "not suitable" and referred her for further proceedings on the suspended criminal charges.'" (*People v. Nubla* (1999) 74 Cal.App.4th 719, 731-732 (*Nubla*); see *People v. Buckhalter* (2001) 26 Cal.4th 20, 30, fn. 6 ["equal protection requires application of section 4019 credits to presentence confinement in a state facility if the circumstances of the confinement are essentially penal"].)

"The purpose of Penal Code section 4019 is to encourage good behavior by incarcerated defendants prior to sentencing. [Citation.] The Legislature's decision to deny Penal Code section 4019 credit to defendants for time spent in nonpenal

institutions has been upheld against an equal protection challenge on the ground that 'those receiving treatment in [nonpenal institutions] have their own incentives for good behavior" [Citation.] This rationale does not apply where the person held in the nonpenal institution has already been excluded therefrom and therefore is no longer receiving treatment. A person who has been excluded from the CRC, but remains housed there, has no incentive for good behavior other than the allowance of Penal Code section 4019 credit. Although a person who spends presentence time in custody at the CRC *after being excluded from the CRC* is not being held in a *penal* institution, the state's interest in encouraging such a person's good behavior is identical to its interest in encouraging the good behavior of presentence county jail detainees." (*People v. Guzman* (1995) 40 Cal.App.4th 691, 695 (*Guzman*); see *People v. Bryant* (2009) 174 Cal.App.4th 175, 182-184.)

When defendant arrived at DVI, he promptly filed a pro. per. demand for a jury trial on his addiction status. Although the parties mention this demand in their briefs, neither party discusses the statutory basis for the demand, which we find significant.

Welfare and Institutions Code section 3051 provides in part: "If, after a hearing, the judge finds that the defendant is a narcotic addict . . . , the judge shall make an order committing the person to the custody of the Director of Corrections for confinement in [CRC] [¶] If a person

committed pursuant to this section is dissatisfied with the order of commitment, he or she may, within 10 days after the making of the order, file a written demand for a jury trial in compliance with Section 3108." (Welf. & Inst. Code, § 3051, 3d & 4th pars.)

Welfare and Institutions Code section 3108 provides in part: "If the person so committed or any friend in his behalf is dissatisfied with the order of commitment, he may within 10 days after the making of such order, file a written demand that the question of his addiction or imminent danger of addiction be tried by a jury in the superior court of the county in which he was committed. Thereupon, the court shall cause a jury to be summoned and to be in attendance at a date stated, not less than 4 days nor more than 30 days from the date of the demand for a jury trial." (See *People v. Lizarraga* (2003) 110 Cal.App.4th 689, 692, fn. 1 (*Lizarraga*) ["a defendant is guaranteed certain procedural safeguards, including a jury trial" if "'dissatisfied' with" a CRC commitment].)

As stated, defendant promptly filed a pro. per. demand for a jury trial when he arrived at DVI. Once defendant did so, he could not legally be sent to CRC, because his demand triggered a duty on the part of the Calaveras County trial court to summon a jury for trial to begin within 30 days, to determine, de novo, whether defendant was a narcotics addict. (Welf. & Inst. Code, § 3108; see *People v. Murphy* (1969) 70 Cal.2d 109, 116-117.)

The prison authorities were obliged to return defendant to Calaveras County and could not send him to CRC.

In effect, from that point, defendant was statutorily ineligible for CRC commitment unless and until a jury found he was an addict. In other cases where a person is ineligible or found unsuitable for CRC, but is still housed at CRC, the person is treated as a prisoner for purposes of credit accrual. (See *People v. Mitchell* (2004) 118 Cal.App.4th 1145, 1148-1150 (*Mitchell*); *Lizarraga, supra*, 110 Cal.App.4th at p. 693; *Nubla, supra*, 74 Cal.App.4th at pp. 731-732; *People v. Rodriguez, supra*, 52 Cal.App.4th at pp. 565-566.) We see no reason why defendant should be treated differently as he, too, was ineligible for CRC once he demanded a jury trial.

Defendant remained at DVI for a total of 36 days. The delay in returning him to Calaveras County was out of his hands. (See *Lizarraga, supra*, 110 Cal.App.4th at p. 693; *Nubla, supra*, 74 Cal.App.4th at pp. 731-732.) Further, his only incentive for good behavior was the possibility of conduct credits. (*Guzman, supra*, 40 Cal.App.4th at p. 695.) In such circumstances, he is entitled to conduct credits for this period. (See *Mitchell, supra*, 118 Cal.App.4th at p. 1150 ["Equal protection permits no other result where, as here, there is nothing in the record to suggest Mitchell received treatment or any other benefit" while confined at CRC].)

The Attorney General contends the record does not show what defendant was doing at DVI, and suggests he may have been

treated differently than other prisoners. A similar assertion has been rejected before: "The Attorney General [assumes] without evidence or authority that Mitchell received some unstated benefit during the 21 days he spent at CRC. We see no basis in law or equity for that assumption, and view it more likely that Mitchell spent those 21 days somewhere in the midst of a bureaucratic maze." (*Mitchell, supra*, 118 Cal.App.4th at p. 1150; see *id.* at p. 1149.) Defendant was in the same limbo that Mitchell was, except *he never even arrived at CRC*. Therefore, we reject the Attorney General's contention.

We modify the judgment to award defendant 244 days of actual presentence credit and 244 days of presentence conduct credit, pursuant to the new formula. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50; see *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendment to statute lessening punishment for crime applies "to acts committed before its passage provided the judgment convicting the defendant of the act is not final"]; *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240 [applying *Estrada* to amendment involving custody credits]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of *Estrada* to amendment following award of custody credits].) Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, §§ 4019, former subds. (b)(2) & (c)(2) [as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50], 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

DISPOSITION

The judgment in case No. C063946 is modified to reflect that defendant is entitled to a total of 488 days of presentence custody credits, consisting of 244 days of actual custody plus 244 days of conduct credit. As modified, the judgment is affirmed. The trial court is directed to prepare and forward a certified copy of the second amended abstract of judgment to the Department of Corrections and Rehabilitation. The appeal in case No. C063008 is dismissed as moot.

_____, BUTZ, J.

We concur:

_____, HULL, Acting P. J.

_____, CANTIL-SAKAUYE, J.